SUPREME COURT, U. S.

JUN 15 1967

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 252

EFRAIN T. SUAREZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to the District Court of Appeal of Florida, Third District, to review the final judgment entered in the above entitled case on June 29, 1966, for which a re-hearing was denied September 30, 1966, and to which a Petition for Writ of Certroiari to the Florida Supreme Court was denied January 17, 1967, and amended February 14, 1967.

CITATIONS TO OPINIONS BELOW

The judgment of the Criminal Court of Record of Dade County, Florida, is unreported and appears in the Record at pp. 516-517.

The decision of the District Court of Appeals of Florida, Third District, is officially reported at 189 So.2d 656 and is printed in Appendix A hereto.

The Supreme Court of Florida did not issue an opinion. Its Order denying Petition for a Writ of Certiorari, and its Order denying a Re-hearing on the Petition for Writ of Certiorari on jurisdictional grounds is printed in Appendix B and C hereto.

JURISDICTION

The decision of the District Court of Appeal of Florida, Third District, was entered on June 29, 1966 (Appendix A hereto). The Order of the Supreme Court of Florida denying the Petition for Writ of Certiorari was entered on January 17, 1967 (Appendix B hereto), and amended February 14, 1967 (Appendix C hereto). An Order Extending Time to File Petition for Writ of Certiorari was entered by Mr. Justice Black on May 15, 1967, extending Petitioner's time for filing to and including June 16, 1967 (Appendix D hereto).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) in that a right, privilege, or immunity is claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether police officers, without authority of warrant, may by subterfuge place one of their number inside a building and use the fact of her presence in a position of possible bodily harm to justify forcible entry to the premises, in violation of the guarantees of the Fourth Amendment to the Constitution of the United States, which guarantees are made applicable to the States by the Fourteenth Amendment to the Constitution of the United States?

2. Whether, consistent with the guarantees of the Fourth Amendment to the Constitution of the United States, and Section 901.19 (1), Florida Statutes, a police officer may kick open the door to gain entry to a building where a person to be arrested is believed to be without first announcing his purpose in gaining entrance?

3. Whether, consistent with the "reasonable search" provisions of the Fourth Amendment to the Constitution of the United States and Section 22 of the Declaration of Rights of the Constitution of Florida, police officers, embarking on a search of the premises, may continue to forcibly and destructively gain entrance to interior rooms of a building wherein they have made an arrest without first announcing their authority and purpose and being denied entry thereof?

4. Whether, consistent with the guarantees against self-incrimination of the Fifth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of the Constitution of Florida, evidence other than fruits of a crime, instrumentalities for commission of a crime, or contraband, may be confiscated by arresting officers and introduced against the accused over his objection when such evidence is obtained as a result of unlawful entry and unreasonable search of the premises?

5. Whether, consistent with the right of persons to be secure against unreasonable seizure guaranteed by the Fourth Amendment to the Constitution of the United States, and Section 22 of the Declaration of Rights of the Constitution of Florida, there was probable cause for officers without authority of warrant to arrest Petitioner inside his place of business when they did not know or have reason to believe he was within the premises at the time they forcibly gained entry to same?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or af-

firmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any within its jurisdiction the equal protection of the laws.

Constitution of the State of Florida, Declaration of Rights, Section 12, as found in Vol. 3, Official Florida Statutes, 1965, at Page 3792:

Double jeopardy; self-incrimination; eminent domain; right to work.—No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation. The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

Constitution of the State of Florida, Declaration of Rights, Section 22, as found in Vol. 3, Official Florida Statutes, 1965, at Page 3793:

Searches and seizures. — The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches, shall not be violated, and no warrants issued, but upon probable cause, supported by oath or affirmation particularly describing the place or places to be searched and the person or persons or thing or things to be seized.

Section 901.19 (1), Florida Statutes, 1965, as found in Vol. 2, Official Florida Statutes, 1965, at page 3640:

Right of officer to break into building.—(1) An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, may break open a door or window of any build-

ing in which the person to be arrested is or is reasonably believed to be, if he is refused admittance after he has announced his authority and purpose.

STATEMENT OF THE CASE

In November, 1963, members of the State Attorney's Office of Dade County, Florida, and the Assistant Chief of Police of the City of Miami decided they would "try to make a case that would hold up" against a Dr. Ayala whom them suspected of performing illegal abortions in violation of Section 797.01, Florida Statutes, at a building located in the City of Miami known as the Ayala Clinic (R. 35, 50).

Two policewomen from Tampa, Florida, Barbara Williams and Myrtle Ellison, were enlisted to assist in the operation (R. 51-52). A plan was devised by the authorities whereby the policewomen would make arrangements for an abortion. Should they be successful, they were to go to the clinic, proceed with preparations for the abortion, and pay the doctor with money marked for this purpose. After having paid the money over, Policewoman Ellison was to exit from the building and leave the door open behind her (R. 35). This was to signal officers waiting outside to enter the building (R. 52).

If anyone attempted to perform any act toward committing an abortion, Policewoman Williams was to place that person under arrest (R. 73). She was not pregnant, nor had she any intention of allowing an abortion to be committed upon her (R. 75-76, 169).

Pursuant to the plan, Policewoman Williams called

the Ayala Clinic on January 2, 1964, and spoke with one who identified himself as Dr. Ayala (R. 51, 67), and made an appointment for the following morning (R. 12).

On January 3, 1964, certain officers from the City of Miami, the two policewomen, and an investigator from the State Attorney's Office went to the vicinity of the Ayala Clinic (R. 4-5). The two women entered the building pursuant to plan (R. 6). Policewoman Williams consulted with a man later identified as the Petitioner, Efrain T. Suarez, who conducted a pelvic examination upon her to determine whether or not she was pregnant (R. 163). This pelvic examination allegedly occurred in one of the interior rooms of the clinic (R. 166). Policewoman Ellison waited in an adjoining interior room (R. 77-79). At no time did Petitioner make any effort to administer medication or drugs, nor did he attempt to use any instrument upon the policewoman (R. 173).

After the examination, the procedure which would be followed was explained to Policewoman Williams (R. 164). Policewoman Williams obtained the money from Policewoman Ellison and paid it over to the Petitioner (R. 163). Policewoman Ellison then left the building (R. 164). The two women had been in the building for twenty to twenty-five minutes (R. 6).

Policewoman Ellison came out and told waiting officers that the money had been passed and that Policewoman Williams was supposed "to get a needle" (R. 8). The officers then entered through an open door into an outer office. There they were confronted by a closed door. One of the officers announced: "Police officers. State Attorney's Office. Open the door." (R. 8). They waited

fifteen to twenty seconds (R. 9). Then they kicked the door down (R. 8).

Police officers had gone to the clinic to arrest anyone on the premises for conspiracy to commit an abortion and for attempted abortion (R. 11).

The police officers knew in advance that an attempt would be made to give Policewoman Williams an injection (R. 33). They also knew in advance that if anyone made any act toward committing an abortion upon her, Policewoman Williams was to place them under arrest (R. 73).

Although there was sufficient time in which to do so (R. 14), the officers did not attempt to secure a warrant for the arrest of anyone or a warrant to search the premises (R. 47, 58). No announcement of purpose was made prior to the forced entry of the premises (R. 177), nor were the officers refused entry to the premises (R. 9).

Passing through the broken door, officers proceeded down a hallway to another door. No announcement of identity, authority, or of purpose, or demand for entry was made at this door, nor was admittance refused. The officers kicked this door down (R. 177). Proceeding down the hallway, officers came to another door which was kicked down without any announcement of authority, purpose, or demand for entry; nor was admittance refused (R. 11, 15). Altogether, approximately five doors were kicked down in this manner (R. 212).

Passing further along the hall, officers met the Petitioner, who was coming toward them in the direction of the building entrance. They immediately placed him

under arrest for conspiracy to commit an abortion, and attempted abortion on Policewoman Williams (R. 15, 16). The officers had not seen nor spoken to Policewoman Williams until after the Petitioner had been arrested (R. 14-15).

An Information was filed alleging conspiracy to commit abortion and attempted abortion (R. 450-454). A Motion to Suppress the Evidence was denied by the trial court (R. 98). Petitioner was found guilty on conspiracy to commit abortion and attempted abortion upon Policewoman Williams (R. 514). A motion for a new trial was denied (R. 526). Assignment of error based on the court's denial of the motion to suppress the evidence was filed (R. 529), and the District Court of Appeals of Florida, Third District, was asked to decide the issue as to whether the evidence should have been suppressed (Appendix 2). By a unanimous decision, the District Court of Appeals reversed the conviction of conspiracy to commit an abortion (Appendix 12).

The Opinion declared that the search and seizure and subsequent admission of the evidence was legal. Refusal of the officers to announce their purpose prior to forcibly entering the premises was deemed to have come within an exception to Sec. 901.09 (1), Florida Statutes, *supra*, as set forth by the Florida Supreme Court in *Benefield* v. *State*, 160 So.2d 706 (Appendix 22-23). Petition for Rehearing was denied September 20, 1966.

The Opinion of the majority of the District Court was predicated upon the arresting officers' "good faith belief" that Policewoman Williams was in imminent peril of bodily harm (Appendix 12). Petitioner respectfully

submits that this finding is not supported in the testimony, but rather that the contrary is indicated, as the minority Opinion states (Appendix 8). The finding of the District Court is therefore in conflict with statute and prior decision of the Florida Supreme Court, and with numerous decisions of this Honorable Court.

In affirming Petitioner's conviction of attempt to commit an abortion upon Policewoman Williams, which was arrived at in the trial court through admission of evidence gained from an illegal search and seizure, the District Court of Appeals of Florida, Third District, committed error.

Petition for Writ of Certiorari was denied by the Florida Supreme Court on jurisdictional grounds in its order dated January 17, 1967, and a Petition for Rehearing was denied on February 14, 1967.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Petitioner relies upon the following reasons why the petition for writ of certiorari should be granted in this case:

Important and substantial issues of federal constitutional law are here presented. They involve the destructive effect of certain law enforcement methods on the basic guarantees of the Fourth Amendment, and the consequent damage to rights and privileges vouchsafed by the Fifth Amendment. They involve the danger which a convenient exception poses to an oft-defended and well established rule.

A requisite to forcible entry of a premises for the purpose of making an arrest is that officers identify themselves, their authority, their purpose, and be refused admittance. This requirement is found in Florida and federal statutes and case law alike. Section 901.09 (1), Florida Statutes, 1965; 18 U.S.C. Sec. 3109; *Benefield* v. *State*, 160 So.2d 706 (1964); *Miller* v. *United States*, (1958) 357 U.S. 301, 78 S.Ct. 1190.

Petitioner respectfully submits that testimony throughout clearly demonstrates that arresting officers consistently failed to announce their purpose in demanding admission.

The State does not contend that the statute was complied with. Counsel for the State made no effort to elicit testimony concerning announcement of purpose even though he was permitted to cross-examine and lead his witness.

In *United States* v. *Barrow*, 212 F.Supp. 837 (D.C. E.D. Pa. 1962), government agents went to a premises to execute arrest warrants. They passed through two doors before coming to a locked door. They announced their identity to the door. They did not announce purpose until entry had been gained by breaking the door. In reversing a conviction, the Court stated at Page 843:

> * * * From their testimony it is unmistakable that no announcement of purpose was made until after the third door was broken down and Agent Frohbose had entered the room. * * *

The Court also observed:

> * * * We think it of extreme significance that government counsel, an able trial lawyer and one more experienced than most in the criminal field, although permitted to cross-examine and lead the government agents who testified, made no attempt to elicit from either Dean or Bass an announcement of purpose before the door was broken down. * * *

The Florida Supreme Court interpreted the state statute in *Benefield* v. *State*, *supra*, laying down the same guidelines as those which govern federal agents.

> * * * When an officer is authorized to make an arrest in any building, he should first approach the entrance to the building. He should then knock on the door, and announce his name and authority * * * and what his purpose is in being there. * * * If he is refused admission * * * he may then break open a door or a window to gain admission to the building and make the arrest. * * *
>
> * * * *
>
> The law forbids the law enforcement officers of the state or of the United States to enter before knocking at the door, giving his name and the purpose of his call. * * *

In *Miller* v. *United States*, (1958) 357 U.S. 301, this Honorable Court observed:

> * * * Whatever the circumstances under which breaking a door to arrest for a felony might be lawful, however, the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission. * * *
>
> * * * *
>
> The rule seems to require notice in the form of an express announcement by officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirements in this case.
>
> * * *

Petitioner respectfully asks why the officers should not have announced their purpose as demanded by statute and prevailing case law? The answer can only be (a) that they forgot to, that they carelessly omitted a statutory requirement, or (b) that they feared that by announcing their purpose they would somehow add to the peril of Policewoman Williams.

If arresting officers omitted an established requirement for no good reason, then their actions in breaking down the door would, it is submitted, be clearly unlawful. In *Miller* v. *United States*, *supra*, this Honorable Court warned against tolerating short cuts to law enforcement since such methods impair its enduring effectiveness. Petitioner respectfully submits that condoning the negligent omission of a statutory requirement is an example of tolerance of short-cut methods.

The latter reason, that their announcement would add to her peril, falls before the fact that the officers did pause before entering. They knocked, announced their identity, and demanded entry before kicking the door down. Judicial recognition of the relevancy of such action is found in *United States* v. *Barrow*, 212 F.Supp. 837 (D.C. E.D. Pa. 1962) at Page 847:

> Secondly, there was in fact an announcement of identity. Obviously, if the agents had a bona fide belief that announcement would result in peril, that peril would come from the fact and not the nature of the announcement. The fact that some announcement was made dispels any doubt that the agents had no bona fide apprehension of peril if an announcement were made.

Petitioner respectfully submits that the entry, from the standpoint of failure to announce purpose, was illegal.

But perhaps the most insidious danger to Fourth Amendment rights of the people to be secure from unreasonable search and seizure is the Florida District Court of Appeal's apparent willingness to allow an exception to dominate the rule. The controlling factor in the majority Opinion seemed to be that officers had a "bona fide belief" that Policewoman Williams was in imminent peril of bodily harm (Appendix 12). This is based upon testimony that officers rushed the building to prevent physical harm from befalling her (R. 45). Yet, Petitioner respectfully submits that this testimony is not consistent with the following:

(1) An element of risk is part and parcel of a police officer's job.

(2) Officers knew in advance what the risk factor was; Policewoman Williams willingly consented to accept that risk (R. 67-76).

(3) As a result of her telephone conversation with "Dr. Ayala", Policewoman Williams was aware that an injection, or an attempted injection, could be anticipated; she discussed this with arresting officers prior to the raid (R. 33).

Testimony of the arresting officer as found in the Record, pp. 32-33, is as follows:

Q (By the State) And did you also have conversation with any police personnel at that time?
A At the time we arrested Suarez?

Q No, at the time that you had the meeting and prior to the arrest and the planning?
A Yes, we had a conversation— I had a conversation with Barbara Williams and other parties.

Q What did she tell you?
A Barbara advised me that she had made an appointment with Dr. Ayala according to who she talked to and that she was supposed to be over at the clinic at 8:00 o'clock on the morning of January 3rd, and to bring with her a thousand dollars, and that she would be there for a period of an hour or two, and would get a needle, and it would be all over, and she could leave in a couple of hours.

(4) Should an attempt have been made to administer an injection or in any manner to commit an act toward an abortion, Policewoman Williams was instructed to place the actor under arrest. The arresting officers were aware of this (R. 73).

So, from the beginning the officers were aware of the element of possible risk, that an attempt to "use a needle" would be made, and that any act committed toward the abortion would prompt Policewoman Williams to effect an arrest. Petitioner respectfully submits that under these circumstances the announcement by Policewoman Ellison that her sister officer was to get "a needle" could not have spurred the sudden, urgent concern that she was in imminent peril of bodily harm as is contemplated by the exception to the rule against unannounced forcible entry to effect an arrest.

In ruling that this case fitted within the exception, the District Court of Appeal of Florida, in effect, sanctioned a convenient excuse for police to utilize for the purpose of violating a state statute, rights under the Florida Constitution, and the guarantees of the Fourth and Fifth Amendments to the United States Constitution.

If this decision is not reviewed, it will open up a broadening avenue of opportunity for law enforcement officers to avoid procedures demanded by the Constitution of the United States.

No longer will persons or premises be safe from unreasonable search and seizure when officers may create their own situation of emergency and plead it as an ex-

cuse to kick down doors to gain immediate entry to a premises.

The Florida District Court of Appeal refused to follow Federal courts on this point. Federal concern was expressed clearly in *Accarino* v. *United States*, 179 F.2d 456 (D.C. 1949) and *McKnight* v. *United States*, 183 F.2d 977 (D.C. 1950).

In *Accarino*, the government contended that exceptional circumstances of emergency justified the arrest and search without a warrant. The court concluded at page 464:

> * * * If thereafter there was a semblance of emergency requiring the breaking of the door, it was created by the officers.

And in *McKnight*, the court stated at page 978:

> * * * [T]here was no necessity to break open doors; or what comes to the same thing for legal purposes, none but what the officers themselves had created. * * * Neither policemen nor private citizens can justify breaking into a house, or other violence, by deliberately creating an alleged necessity for it. * * *

In the case at bar, police officers not only created the situation that existed, but they did it deliberately, intentionally, and with full knowledge of the procedure that was to be followed. Their purpose was to fabricate a necessity for breaking down the door to enter at the optimum moment to effect an arrest of persons or persons unknown.

Their plan was nothing more nor less than a "police strategem" such as the Court roundly condemns in *McKnight* and *Accarino.*

As the minority opinion of the District Court of Appeals found, there was no "valid reason" to justify a belief that Policewoman Williams was in imminent peril of bodily harm.

Therefore, Petitioner respectfully submits that there was no justifiable reason for omitting the requirement of announcement of purpose of the demanded entry. Thus, the entry was illegal.

In finding that the officers had "good faith belief" that Policewoman Williams was in imminent peril of bodily harm, and that this was sufficient reason for their forcible entry to the premises without conforming to the requirements of statute, Petitioner respectfully submits that the District Court of Appeal of Florida, Third District, decided a federal question of substance in a way probably not in accord with applicable decisions of this Court. That opinion is therefore subject to review by this Honorable Court on a writ of certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Angus M. Stephens, Jr.

Barry L. Garber
Counsel for Petitioner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For A Writ Of Certiorari was mailed, first class, postage prepaid to the Honorable Earl Faircloth, Esquire, Attorney General of the State of Florida and Arden M. Siegendorf, Assistant Attorney General of the State of Florida, State Office Building, 1350 N. W. 12th Avenue, Miami, Florida, Attorneys for Respondent, State of Florida, this _____ day of June, 1967.

_____

Angus M. Stephens, Jr.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. _____

EFRAIN T. SUAREZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

APPENDIX A

Onelio Garcia RODRIQUEZ, Efrain T. Suarez, Julieta Maria Calleiro, Abigail Margarita Calleiro Casanueva and Yolanda Venegas Calleiro, Appellant,

v.

The STATE of Florida, Appellee.

Nos. 65-59, 65-60, 65-256 to 65-258.

District Court of Appeal of Florida.

Third District.

June 29, 1966.

On Denial of Rehearing in No. 65-60

Sept. 20, 1966.

Prosecution for conspiracy to commit abortion and attempted abortion. The Criminal Court of Record, Dade County, Gene Williams, J., entered judgment convicting all defendants of conspiracy to commit abortion and, in addition, convicting one defendant of attempted abortion, and appeals were taken. The District Court of Appeal held that officers who, immediately prior to entry into medical clinic, were informed by policewoman that another policewoman was inside clinic and that defendant was going to "stick her with a needle" had reasonable cause to believe that policewoman within clinic was in imminent peril of bodily harm and were thus justified, after announcing their authority and waiting for response at waiting room door, in breaking open interior doors without announcing their authority.

Judgments of conviction for conspiracy to commit

abortion reversed; judgment of conviction for attempted abortion affirmed.

Swann, J., dissented in part.

Walter E. Gwinn, Miami, for appellants.

Earl Faircloth, Atty. Gen., and Arden M. Siegendorf, Asst. Atty. Gen., for appellee.

Before PEARSON, BARKDULL and SWANN, JJ.

SWANN, Judge.

This is a consolidated appeal from judgments and sentences entered following a jury trial in the Criminal Court of Record of Dade County, Florida.

Essentially, the facts are that two policewomen from Tampa, Florida were enlisted by the City of Miami Police Department and the State Attorney's Office of Dade County, Florida, to try to get into the Ayala Clinic and make arrangements for an abortion. Policewoman Williams called the Ayala Clinic about an abortion and talked to a person who identified himself as Dr. Ayala. The policewoman made an appointment for the following day and was quoted a price of One Thousand Dollars for the operation. On the appointed day, Policewoman Williams and Policewoman Ellison entered the clinic and consulted with a man later identified as the appellant Suarez. At the same time, other police officers were watching the front and back of the clinic. Policewoman Ellison waited in the reception room

while Policewoman Williams was taken into an examination room, where a pelvic examination was conducted by the appellant Suarez. There were no instruments used in the examination and there was a conflict in the testimony as to whether there were any instruments in the examining room at the time of the examination. Policewoman Williams remained fully clothed at all times, with the exception of her panties, which were removed during the examination. Following the examination, appellant Suarez explained the procedure by which he was to bring about the abortion. At this point, Policewoman Williams told Suarez that the money required for the operation was in her purse which Policewoman Ellison was holding in the waiting room. Policewoman Ellison brought the money into the examination room and it was given to Suarez. She then left the building and informed the officers outside that Policewoman Williams was supposed "to get a needle".

The police officers entered the clinic through the public front door, which was left open by Policewoman Ellison, and proceeded into the clinic. Upon reaching the waiting room door, the officers knocked and announced that they were police officers and from the State Attorney's office. After waiting approximately fifteen to thirty seconds, the officers kicked down the door. They had no search warrant for the premises nor warrants for arrest. No announcement of purpose was made prior to kicking down the door. The officers proceeded down a hallway and came upon another door, which was also kicked down without announcement of authority or purpose. There was testimony that approximately five doors were kicked down without an announcement of their purpose.

The officers met Suarez in the hallway coming toward

them from the direction of the first door that was kicked down. He was placed under arrest for conspiracy to commit an abortion and attempted abortion on Policewoman Williams. The other appellants were arrested when found in various parts of the clinic.

The appellants were tried for attempted abortion and conspiracy to commit abortion. All of the appellants were convicted of conspiracy to commit abortion, and in addition, Suarez was convicted of attempted abortion. This appeal followed.

Prior to the trial, the appellants moved to suppress the evidence seized in the raid and the trial court denied the motion. The appellants have assigned this as error and assert as authority for reversal Section 901.19(1), Florida Statutes, F.S.A., and Benefield v. State, Fla.1964, 160 So.2d 706.

Section 901.19(1) provides:

> "An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if he is refused admittance *after he has announced his authority and purpose.*" (Emphasis supplied)

The State concedes that the arresting officers did not announce their purpose before breaking open the doors in the building.

In Benefield, supra, the Supreme Court of Florida set forth the requirements for entry of a building to make an arrest:

* * * * *

"* * * When an officer is authorized to make an arrest in any building, he should first approach the entrance to the building. He should then knock on the door and announce his name and authority, sheriff, deputy sheriff, policeman or other legal authority and *what his purpose is in being there.* * * * If he is refused admission * * * he may then break open a door or window to gain admission to the building and make the arrest. * * *" (Emphasis supplied.)

* * * * *

"* * * The law forbids the law enforcement officers of the state or the United States to enter before knocking at the door, giving his name and the *purpose of his call.* * * *" (Emphasis supplied.)

* * * * *

The appellee counters that the court in Benefield, supra, clearly sets forth four specific exceptions to this rule on page 710 as follows:

* * * * *

"As we interpret the common law authorities in relation to § 901.19(1), Florida Statutes, F.S.A., we conclude that even if probable cause exists for the arrest of a person, *our statute is violated by an un-*

announced intrusion in the form of a breaking and entering any building, including a private home, except (1) where the person within already knows of the officer's authority and purpose; (2) *where the officers are justified in the belief that the persons within are in imminent peril of bodily harm;* (3) if the officer's peril would have been increased had he demanded entrance and stated the purpose, or (4) where those within made aware of the presence of someone outside are then engaged in activities which justify the officers in the belief that an escape or destruction of evidence is being attempted. Time and experience will no doubt suggest other exceptions * * *." (Emphasis supplied)

* * * * *

It is contended by the appellee that under the second exception set forth above the officers were justified in their actions since they believed that the policewoman within the clinic was in imminent peril of bodily harm.

The only possible evidence to justify such a belief was the statement made by Policewoman Ellison to the arresting officers that "he is going to stick her with a needle."

The arresting officers knew and the policewoman testified that if any attempt was made to begin an abortion that she should place him (Suarez) under arrest. The testimony further reveals that there was never any indication that a needle was about to be given to Policewoman Williams in the presence of Policewoman Ellison or that Suarez attempted to give her a shot.

None of the officers testified that they believed Policewoman Williams was in "imminent peril of bodily harm". Under the particular facts in this case, there appears to be no valid reasons to justify such a belief; therefore, the general rule of Benefield should apply, and not the exception.

Since Section 901.19(1) was not complied with the fruits of the subsequent search should have been excluded by the trial court upon proper motion.

[1] While the appellee concedes that appellant Suarez had standing to challenge the validity of the search and seizure, they contend that there was no showing of the requisite possessory interest in the premises by the other appellants so as to allow them to object. There is no need to determine whether the other individual appellants had standing, since we find merit in the appellant's contention that the evidence is legally insufficient to sustain a conviction for the crime of conspiracy to commit an abortion on Policewoman Williams.

The testimony indicates that all occurrences and transactions between Policewoman Williams and Suarez were done outside the presence of the other appellants. None of the other appellants ever saw or talked to Policewoman Williams. There is no evidence that any of the other appellants knew her; or that they knew she was even in the clinic at the time of the alleged attempted abortion; or that they participated in any way in the actions toward Policewoman Williams.

While there was some testimony about medical services rendered to other persons in the clinic by some of the appel-

lants, they were not tried for any other offense, except as to the alleged conspiracy to commit an abortion on Policewoman Williams.

As there was no direct testimony to link the other appellants to the attempted abortion of Policewoman Williams, any inferences of a conspiracy to commit an abortion on her would be by purely circumstantial evidence.

[2] When circumstantial evidence is relied upon for conviction in a criminal case, the circumstances, when taken together, must be of a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused, *and no one else*, committed the offense. It is not sufficient that the facts create a strong probability of, and be consistent with guilt; they must be inconsistent with innocence. Simmons v. State, 1930, 99 Fla. 1216, 128 So. 486; Lee v. State, 1928, 96 Fla. 59, 117 So. 699; Davis v. State, 1925, 90 Fla. 816, 107 So. 245. The facts herein may have created a strong probability of guilt of conspiracy to commit abortion, but they were not consistent with guilt and inconsistent with innocence.

For the reasons stated, the judgment and convictions of the appellants of conspiracy to commit abortion should be reversed and the appellants discharged; and the judgment and conviction of the appellant Suarez of attempted abortion should be reversed and remanded for a new trial.

BARKDULL, Judge (concurring in part).

[1, 2] I concur with so much of Judge Swann's opinion that finds insufficient evidence to convict the appellants of conspiracy to commit abortion which would discharge

them from the cause. However, I am unable to agree relative to the appellant Suarez. He was convicted of attempted abortion and the opinion finds that the trial court committed error in refusing to suppress the evidence seized at the time of his apprehension.

It appears to me that the pivotal point in this record is whether or not the law enforcement officers were justified in breaking down an *inner* door of a medical clinic, after having been informed that the police woman inside was about to get a shot and abortion, thereby effecting a legal arrest rendering the evidence seized admissible.

[3-7] The question of the validity of the right of entry was properly a matter to be determined by the trial court on a motion to suppress, because what constitutes a valid arrest so as to support an incidental search is a mixed question of law and fact to be determined by the trial court upon due consideration of the circumstances and manner under which the search is made. See: Haile v. Gardner, 82 Fla. 355, 91 So. 376; Brown v. State, Fla.1950, 46 So.2d 479; Urso v. State, Fla.App.1961, 134 So.2d 810; Diaz v. State, Fla.App.1965, 181 So.2d 351. The trial court's ruling on the motion to suppress in the instant case comes to this court with a presumption of correctness and, in testing the accuracy of the trial court's conclusions, we should interpret the evidence and all reasonable inferences and deductions capable of being drawn therefrom in a light most favorable to sustain these conclusions. See: Cameron v. State, Fla.App.1959, 112 So.2d 864; Savage v. State, Fla.App.1963, 156 So.2d 566, 1959. In so doing, if the record reveals that the facts known to the arresting officers before their entry are not inconsistent with a good faith belief on their part that compliance with § 901.19(1)

Fla.Stat., F.S.A., is excused, their failure to comply with the formal requirements of said section does not justify the exclusion of the evidence they obtain. See: People v. King, 140 Cal.App. 2d 1, 294 P.2d 972; People v. Ramsey, 157 Cal.App.2d 178, 320 P.2d 592. This is so because the officers must decide this question ordinarily on the spur of the moment and without benefit of hindsight. See: Williams v. United States, 9th Cir.1959, 273 F.2d 781, Cert. denied 362 U.S. 951, 80 S.Ct. 862, 4 L.Ed.2d 868; People v. Maddox, 46 Cal.2d 301, 294 P.2d 6; People v. Morris, 157 Cal.App.2d 81, 320 P.2d 67; Reid v. United States, D.C.Mun.App.1964, 201 A.2d 867; State v. Smith, 37 N.J. 481, 181 A.2d 761, Cert. denied 374 U.S. 835, 83 S.Ct. 1879, 10 L.Ed.2d 1055. It was brought out in the evidence before the trial judge, on the motion to suppress, that immediately prior to making entry into the clinic the officers were informed " 'The doctor has the money, and Barbara is inside, and he is going to stick her with a needle.' She said the doctor was going to stick her with a needle.", and believed that the police woman was about to be injured, to wit:

* * * * *

"Q (By Mr. Gwinn) Mr. Daugherty, you knew too —you say that you wanted to make sure about Mrs. Williams, and that was it that you wanted to go in for?
"A The reason I went in hastily?

"Q Yes.
"A I wanted to make sure Mrs. Williams was not physically harmed or otherwise in any way."

* * * * *

[8] It appears to me that these facts, known to the officers at the time they broke in, are consistent with a good faith belief on their part that they were excused from compliance with § 901.19(1) Fla.Stat., F.S.A., pursuant to the second exception outlined in Benefield v. State, Fla.1964, 160 So.2d 706, which is relied upon so heavily in Judge Swann's opinion; and the officers were justified in making their entry. Furthermore, it must also be noted that in this latter cited case there was no contention that the officers at any time announced their authority nor their purpose, *whereas in the instant case the officers did announce their authority and they did wait for a response prior to breaking the interior door.*

Therefore, I would affirm the conviction of the appellant Suarez for attempted abortion.

PEARSON, Judge (specially concurring).

[1-8] I concur with so much of the opinion of Judge Swann that reversed the convictions of the appellants of the crime of conspiracy to commit abortion, and Judge Barkdull's opinion affirming the conviction of the appellant Suarez as to the crime of attempted abortion.

Therefore, the verdicts, judgments, and sentences under review in Case Nos. 65-59, 65-256, 65-257 and 65-258 be and they are hereby reversed and the appellants discharged. So much of the verdict, judgment and sentence here under review in Case. No. 65-60 as relates to the crime of conspiracy to commit abortion be and the same is hereby reversed, but so much of said verdict, judgment, and sentence as relates to the crime of attempted abortion by the appellant Suarez be and the same is hereby affirmed.

ON REHEARING in No. 65-60.

PER CURIAM.

[9] The appellant has filed a petition for rehearing, addressed to the majority opinion which affirmed his conviction upon the charge of attempted abortion. In and by the petition addressed to this opinion, it is urged that the court overlooked and failed to consider the points raised on appeal as to the sufficiency of the information to charge the crime and the sufficiency of the evidence to support the charge. These points were examined originally and have been examined subsequent to the filing of the petition for rehearing, and are found to be without merit. See: Gustine v. State, 86 Fla. 24, 97 So. 207; Urga v. State, 155 Fla. 86, 20 So.2d 685; Pittman v. State, Fla. 1950, 47 So.2d 691; People v. Berger, 131 Cal.App.2d 127, 280 P.2d 136; People v. Woods, 24 Ill.2d 154, 180 N.E.2d 475.

Therefore these and the other grounds of the petition for rehearing having been found to be insufficient, the same be and it is hereby denied.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1967

Tuesday, January 17, 1967

Case No. 35,726

EFRAIN T. SUAREZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date June 29, 1966, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

TEST:

SID J. WHITE
Clerk Supreme Court.

cc: Honorable W. P. Carter
Honorable J. F. McCracken
Honorable Arden M. Siegendorf
Honorable Walter E. Gwinn

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1967

Tuesday, February 14, 1967

Case No. 35,726

EFRAIN T. SUAREZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

The order of this Court dated Tuesday, January 17, 1967, is hereby revised as follows:

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon so much of the record tendered to reflect jurisdiction and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date June 29, 1966, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied for lack of jurisdiction.

The petition for rehearing filed by petitioner is visited to the revised decision as set forth above and denied.

A True Copy

TEST:

SID J. WHITE
Clerk Supreme Court.

cc: Honorable Walter E. Gwinn
Honorable Arden M. Siegendorf
Honorable W. P. Carter
Honorable J. F. McCracken

APPENDIX D

SUPREME COURT OF THE UNITED STATES

October Term, 19

No._____

EFRAIN T. SUAREZ,

Petitioner,

vs.

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 16th, 1967.

s Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 15th day of May, 1967.

APPENDIX E

SUPREME COURT OF FLORIDA.

Feb. 12, 1964

No. 32506.

J. C. BENEFIELD,

Petitioner,

v.

The STATE of Florida,

Respondent.

The defendant was convicted in the Circuit Court for Pinellas County, John U. Bird, J., of attempted grand larceny, and he appealed. The District Court of Appeal, 151 So.2d 650, affirmed, and the defendant brought certiorari. The Supreme Court held that lawfulness of arrest without warrant was vitiated by arresting officers' entry of defendant's home without announcement of authority and purpose, although arrest might have been based on probable cause.

Decision of District Court of Appeal quashed; cause remanded thereto for further consideration.

Thomas and O'Connell, JJ., dissented.

Fogle, Wilson & Shingler, St. Petersburg, and Lindsey & Cargell, St. Petersburg Beach, for petitioner.

James W. Kynes, Atty. Gen., and James G. Mahorner, Asst. Atty. Gen., for respondent.

TERRELL, Justice.

Petitioner, J. C. Benefield, was informed against for grand larceny. He was tried by a jury and convicted of attempt to commit grand larceny. On appeal his conviction was affirmed by the District Court of Appeal, Second District. Petitioner now seeks review of the latter judgment by certiorari on the theory that it is in direct conflict with this court's decision in Dickens v. State, Fla.1952, 59 So.2d 775.

[1] It is clear from an examination of the opinions in the case at bar and the Dickens case that although both involve substantially the same controlling facts, identical rules of law were applied to each in such a way as to produce opposite results. That is sufficient to activate this court's jurisdiction. See Nielsen v. City of Sarasota, Fla. 1960, 117 So.2d 731.

If there are those who do not think we have jurisdiction on this theory, certainly we have it on the theory that the decision of the district court of appeal herein has generated confusion and instability among the precedents rendering the law "unclear, if not in conflict," as we said in Trustees of the Internal Improvement Fund v. LoBean, Fla.1961, 127 So.2d 98. For additional authorities see Justice Thornal's opinion in Kyle v. Kyle, Fla.1962, 139 So.2d 885, and Justice Hobson's special concurrence in King v. State, Fla.1962, 143 So.2d 458, and his opinion in Pinkerton-Hays Lumber Co. v. Pope, Fla.1961, 127 So.2d 441.

The essential facts in the case are as follows: Petitioner is alleged to have approached Hollander and Rosenthal, operators of a bowling alley located in St. Petersburg,

and offered to help them secure a liquor license if they would pay him $5,000 in small bills. On April 27, 1961, Hollander and Rosenthal, after notifying the St. Petersburg Times and the St. Petersburg police department and securing certain marked money from their attorney, went to the petitioner's office. The petitioner was not at his office but was at home sick so they proceeded to his home in St. Petersburg. They were accompanied by two city detectives who waited outside while Hollander and Rosenthal entered the petitioner's home for the purpose of delivering the marked money to him. Upon completion of the transaction with petitioner, Hollander and Rosenthal left the house. One of the police officers, Sgt. Hooper, approached Hollander and Rosenthal just as they left the doorway. The sergeant asked Hollander if the petitioner had the money. Hollander nodded yes. The police officer then "stepped inside the door," asked petitioner's wife if the petitioner was home and if he could see him, walked back to the petitioner's bedroom, and after identifying himself to the petitioner, placed the petitioner under arrest. Sgt. Hooper further testified that when he entered the front door it was open, that Hollander was holding it open, and that he stepped inside before he saw petitioner's wife.

Hollander testified that he did not hold the door open for the officers, and petitioner's wife testified that by the time she had reached the hall, Sgt. Hooper had opened the door and was standing inside.

The record discloses that the two arresting officers made no announcement of their authority and purpose before entering petitioner's home; in fact, this was not done until the officers entered petitioner's bedroom at the rear

of the home. The trial judge himself noted that the officers were not inside the home with the permission of petitioner or his wife.

On May 11, 1961, petitioner made timely motion to suppress the introduction of the marked money on the ground that it was secured by an unlawful search and seizure. Said motion was denied by the trial court on August 17, 1961, after hearing testimony and arguments of counsel.

It is clear from the record that the police officers did not have a search warrant or a warrant for petitioner's arrest and that the search for the money took place subsequent to petitioner's arrest.

The district court of appeal held that because the police officers had reasonable grounds to believe that petitioner had committed a felony, his arrest without a warrant was authorized by § 901.15, Florida Statutes, F.S.A., and thus valid. Said holding of the district court of appeal might have been a correct interpretation of § 901.15 if the officers had found petitioner out on the commons and were attempting to arrest him. In this case petitioner was in his home and the officers were proceeding under § 901.19(1), Florida Statutes, F.S.A. They were bound by the requirements of that act and what we have said here relates to the execution of it. There was no attempt whatever to comply with § 901.19(1), Florida Statutes, F.S.A., and the two acts relate to a different kind of arrest.

[2-4] The evidence seized, in order to be admissible at trial, must be the product of a search incident to a law-

ful arrest, since the officers had no search warrant. Mixon v. State, Fla.1951, 54 So.2d 190. The lawfulness of an arrest without warrant, in turn must be based upon probable cause, which exists, where the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed. Ker v. California, 1963, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726; Dunnavant v. State, Fla.1950, 46 So.2d 871. In the instant case the officers were in possession of the affidavits of Hollander and Rosenthal which described the petitioner's activities prior to the payoff. The officers also were aware that Hollander and Rosenthal had entered the petitioner's house for the purpose of delivering certain marked money to him. Immediately prior to their entry into petitioner's home, Hollander had informed the arresting officer that the money had been delivered. It is, therefore, clear that the officers may have had probable cause to believe a felony had been committed. Nevertheless, the question recurs, was the lawfulness of the arrest, even though based on probable cause, vitiated by the unlawful means in which the home was entered?

[5] In a recent opinion of the Supreme Court of the United States, that court recognized that the lawfulness of an arrest by a state officer for an offense against a state is to be determined by state law. Ker v. California, supra.

Section 901.19(1), the applicable Florida Statute, provides:

> "An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make

> such arrest for a felony without a warrant, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if he is refused admittance after he has announced his authority and purpose."

[6] The facts reveal that the officers did not make the slightest effort to comply with this statute. Although there is some question as to whether or not Hollander held the door open for Sgt. Hooper, Hollander's testimony, as well as that of Mrs. Benefield, clearly discloses that the officer opened the unlocked screened door and stepped into the house. Such an entry would constitute entry by breaking. Boynton v. State, Fla.1953, 64 So.2d 536, 548, and Scott v. State, Fla.App.1962, 137 So.2d 625.

[7] It is true that the act is ambiguous and poorly drawn, but a reasonable interpretation of it runs like this: When an officer is authorized to make an arrest in any building, he should first approach the entrance to the building. He should then knock on the door and announce his name and authority, sheriff, deputy sheriff, policeman or other legal authority and what his purpose is in being there. If he is admitted and has a warrant, he may proceed to serve it. He is not authorized to be there to make an arrest unless he has a warrant or is authorized to arrest for a felony without a warrant. If he is refused admission and is armed with a warrant or has authority to arrest for a felony without a warrant, he may then break open a door or window to gain admission to the building and make the arrest. If the building happens to be one's home, these requirements should be strictly observed.

[8] Entering one's home without legal authority and

neglect to give the occupants notice have been condemned by the law and the common custom of this country and England from time immemorial. It was condemned by the yearbooks of Edward IV, before the discovery of this country by Columbus. Judge Prettyman for the Court of Appeals in Accarino v. United States, 85 U.S.App.D.C. 394, 179 F.2d 456, 465, discussed the history and reasons for it. See also 22 Mich.L.Rev. 541, 673, 798, "Arrest Without a Warrant," by Wilgus. William Pitt categorized a man's home as his castle. Paraphrasing one of his speeches in which he apostrophized the home, it was said in about this fashion: The poorest pioneer in his log cabin may bid defiance to the forces of the crown. It may be located so far in the backwoods that the sun rises this side of it; it may be unsteady; the roof may leak; the wind may blow through it; the cold may penetrate it and his dog may sleep beneath the front steps, but it is his castle that the king may not enter and his men dare not cross the threshold without his permission.

This sentiment has moulded our concept of the home as one's castle as well as the law to protect it. The law forbids the law enforcement officers of the state or the United States to enter before knocking at the door, giving his name and the purpose of his call. There is nothing more terrifying to the occupants than to be suddenly confronted in the privacy of their home by a police officer decorated with guns and the insignia of his office. This is why the law protects its entrance so rigidly. The law so interpreted is nothing more than another expression of the moral emphasis placed on liberty and the sanctity of the home in a free country. Liberty without virtue is much like a spirited horse, apt to go berserk on slight provocation if not restrained by a severe bit.

In this case the officers totally ignored every requirement of the law as above interpreted. They barged into petitioner's home without knocking or giving any notice whatever of their presence; they did not have a search warrant or warrant to arrest anyone; they ransacked petitioner's home without the least semblance of any showing of authority. The petitioner was in bed sick at the time and the officers knew it. For all the record shows, there is no material difference in the entrance here from that in the Dickens case. In that case they entered the back door without permission, while in this case they entered the front door without permission. They were trespassers in both cases. They completely ignored every requirement of § 901.19(1), Florida Statutes, F.S.A., so everything they did inside the home was done as trespassers in total disregard of the responsibility the law imposed on them to knock, give notice and the purpose of their mission. We do not attempt to prescribe what would constitute a reasonable search except to say that what was done here was unreasonable under any standard that would be approved by a free country.

The state argues that the Ker case, supra, involved a California statute similar to § 901.19, Florida Statutes, F.S.A., permitted an unannounced entry because of the fact that the evidence [narcotics] could have easily been destroyed.

As we interpret the Ker decision, the majority of the court held that California had engrafted certain judicial exceptions to their statute and that these exceptions did not violate federal constitutional standards of reasonableness. Even if we had authority to do so, we find no reason to engraft judicial exceptions on the statute in this case.

If these amount to amendments to the common law rule, they would have to be done by statute in this state.

Section 901.19, Florida Statutes, F.S.A., like its counterpart California statute, appears to represent a codification of the English common law which recognized the fundamental sanctity of one's home yet nevertheless provides that an arresting officer "may break open doors, if the party refused upon demand to open them." 1 Hales Pleas of the Crown (1763) 583; see also Justice Brennan's dissent in Ker v. California, supra. The California judicial exceptions to their statute merely represents the recognition of certain established exceptions to the common law rule. As the California court pointed out in the case of People v. Maddox, 1956, 46 Cal.2d 301, 294 P.2d 6, cert. den. 352 U.S. 858, 77 S.Ct. 81, 1 L.Ed.2d 65:

> "It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling and to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. [7] Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844. [8] Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be inter-

preted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. Read v. Case, 4 Conn. 166, 170 [10 Am.Dec. 110]; see, Restatement, Torts, § 306, comment d. Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance."

[9] As we interpret the common law authorities in relation to § 901.19(1), Florida Statutes, F.S.A., we conclude that even if probable cause exists for the arrest of a person, our statute is violated by an unannounced intrusion in the form of a breaking and entering any building, including a private home, except (1) where the person within already knows of the officer's authority and purpose; (2) where the officers are justified in the belief that the persons within are in imminent peril of bodily harm; (3) if the officer's peril would have been increased had he demanded entrance and stated the purpose, or (4) where those within made aware of the presence of someone outside are then engaged in activities which justify the officers in the belief that an escape or destruction of evidence is being attempted. Time and experience will no doubt suggest other exceptions, but when the facts of this case are measured against the statutory criteria and its exceptions, it is clear that the unannounced entry of the officers in this case violated the statute and vitiated the arrest made pursuant to probable cause without warrant.

In reaching this conclusion, we have not overlooked the state's argument that the marked money could have easily been disposed of by the classic method of flushing it

down the drain. This argument must be rejected in the face of the practical difficulties inherent in disposing of $3,000 in small bills by that method. Under the peculiar facts of this case, we are convinced that § 901.19(1), Florida Statutes, F.S.A., was violated and that its violation is not excused by any of the exceptions discussed herein and for this reason the fruits of the search being the product of an unlawful arrest and a search incident thereto, should have been excluded by the trial court upon proper motion. Such disposition of this case brings it into harmony with our decision of Dickens v. State, supra, wherein we held:

> "When an arresting officer enters one's back door for the purpose of searching the premises and to make an arrest without a search warrant he is little more than a trespasser."

Miller v. United States, 1958, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332, is very similar to the case at bar. Miller was convicted in the District Court, District of Columbia for violating federal narcotic laws. He sought to suppress evidence consisting of marked currency found in his apartment after his arrest. His contention was that the currency was unlawfully seized, since its seizure followed the breaking of his door by police officers who sought to arrest him without a warrant and the officers, before breaking the door, had not informed him of their purpose in demanding admission. The conviction was affirmed by the United States Court of Appeals for the District of Columbia, 100 U.S.App.D.C. 302, 244 F.2d 750. On certiorari the United States Supreme Court reversed the conviction. Justice Brennan, speaking for six justices, held that the arrest was unlawful and the currency seized thereafter inadmissible in evidence since the police officers had not

expressly demanded admission or stated the purpose of their presence before breaking defendant's door, and the evidence did not warrant a finding that the facts known to the officers justified them in being virtually certain that defendant knew their purpose so that an announcement thereof would have been a useless gesture.

For the reasons above stated, the decision of the district court of appeal herein is quashed and this cause is remanded to said court for further consideration not inconsistent with the decision herein.

PER CURIAM.

The foregoing opinion and judgment by TERRELL, J., prepared prior to his death on January 12, 1964, is hereby adopted as the opinion and judgment of this Court.

It is so ordered.

DREW, C. J., and ROBERTS, THORNAL, CALDWELL, and HOBSON (Ret.), JJ., concur.

THOMAS and O'CONNELL, JJ., dissent.